

A paper presented for The Continuing Professional Education Department of the
College of Law on Thursday 13 May 2010

Proportionate Liability 5 years on

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ACKNOWLEDGEMENTS

The presenter gratefully acknowledge the extensive assistance of Marcus Young and Sean O’Brien of University Chambers in the preparation of this paper. Mr Young and O’Brien specialise in equity and commercial law. Mr Young is co-author, of the 2008 Lexis Nexis textbook *The Essential Guide to Mortgage Law in NSW*.

Introduction

The *Civil Liability Amendment (Personal Responsibility) Act 2002* No 92 amended the *Civil Liability Act 2002* (NSW) to introduce into this State a proportionate liability regime for the most common type of civil suit, being an action for failure to take reasonable care. The *Civil Liability Amendment (Personal Responsibility) Act* was assented to on 28 November 2002 and the proportionate liability regime in Part IV of the *Civil Liability Act 2002* commenced on 6 December 2002. As, however, the *Civil Liability Regulation 2003* excluded Part IV from applying to any liability arising before 26 July 2004, the relevant section of the *Civil Liability Act* was not in truly operative before that date.

Similar legislation was enacted in 2004 by the Commonwealth in its *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) to amend the *Trade Practices Act*, *Corporations Act*, and *Australian Securities and Investment Commission Act* to introduce proportionate liability to those Acts in relation to claims relating to misleading and deceptive conduct. The commencement date of the amendments to those Acts was also 26 July 2004, which can be taken as the date proportionate liability became a reality in New South Wales.

There is always a significant time lag when a new Act commences before its provisions can be properly understood, as disputes must arise and then make their way through the courts for judgment before relevant authorities are available to lawyers to aid in the construction of the Act. It is now more than five years since the effective commencement of proportionate liability in New South Wales, and it is time to take stock of how the relevant legislative provisions have been interpreted in this State, and also examine the construction of similar provisions in other jurisdictions.

The legislation

New South Wales

The key sections of the *Civil Liability Act 2002* (as currently amended) and *Civil Liability Regulation 2003* which relate to proportionate liability are as follows:

Civil Liability Act 2002

3A Provisions relating to operation of Act

- (1) A provision of this Act that gives protection from civil liability does not limit the protection from liability given by another provision of this Act or by another Act or law.
- (2) This Act (except Part 2) does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract with respect to any matter to which this Act applies and does not limit or otherwise affect the operation of any such express provision.

- (3) Subsection (2) extends to any provision of this Act even if the provision applies to liability in contract.

3B Civil liability excluded from Act

- (3) The regulations may exclude a specified class or classes of civil liability (and awards of damages in those proceedings) from the operation of all or any specified provisions of this Act. Any such regulation may make transitional provision with respect to claims for acts or omissions before the commencement of the regulation.

34 Application of Part

- (1) This Part applies to the following claims ("apportionable claims"):
 - (a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury,
 - (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act.
- (1A) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).
- (2) In this Part, a "concurrent wrongdoer", in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.
- (3) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).
- (4) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

34A Certain concurrent wrongdoers not to have benefit of apportionment

- (1) Nothing in this Part operates to limit the liability of a concurrent wrongdoer (an "excluded concurrent wrongdoer") in proceedings involving an apportionable claim if:
 - (a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim, or
 - (b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim, or
 - (c) the civil liability of the concurrent wrongdoer was otherwise of a kind excluded from the operation of this Part by section 3B.
- (2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

- (3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.

35 Proportionate liability for apportionable claims

- (1) In any proceedings involving an apportionable claim:
 - (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss, and
 - (b) the court may give judgment against the defendant for not more than that amount.
- (2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:
 - (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part, and
 - (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
- (3) In apportioning responsibility between defendants in the proceedings:
 - (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributory negligent under any relevant law, and
 - (b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.
- (4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.
- (5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.

35A Duty of defendant to inform plaintiff about concurrent wrongdoers

- (1) If:
 - (a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the "other person") may be a concurrent wrongdoer in relation to the claim, and
 - (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:
 - (i) the identity of the other person, and
 - (ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim, and

- (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim,

the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.

- (2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

36 Contribution not recoverable from defendant

A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim:

- (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant), and
- (b) cannot be required to indemnify any such wrongdoer.

37 Subsequent actions

- (1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.
- (2) However, in any proceedings in respect of any such action the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

38 Joining non-party concurrent wrongdoer in the action

- (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

39 Application of Part

Nothing in this Part:

- (a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable, or

- (b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable, or
- (c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

Civil Liability Regulation 2003

3 Proportionate liability

Any civil liability to which Part 4 of the Act would have applied but for this clause is excluded from the operation of that Part, and from the operation of clauses 6 and 13 of Schedule 1 to the Act in their application to that Part, if the liability arose before 26 July 2004.

Commonwealth

ASIC Act

The *Australian Securities and Investment Commission Act 2001* (“ASIC Act”), in sections 12GP to 12 GW, has effectively identical proportionate liability provisions to the TPA, which apply in relation to misleading and deceptive conduct under s 12DA of the ASIC Act.

Corporations Act

The *Corporations Act 2001* in sections 1041L to 1041S again has the same regime, and again they apply to misleading and deceptive conduct, in this case under s 1041H of the Corporations Act. Due to the close similarity between these two sets of provisions and those in the TPA, the ASIC Act and Corporations Act provisions are not reproduced below, and for the most part in this paper their operation will not be separately analysed.

Trade Practices Act 1974

Part VIA of the *Trade Practices Act 1974* (“TPA”), which is headed “Proportionate Liability for Misleading and Deceptive Conduct”. Part VIA is worded very similarly to sections 34 - 39 of the *Civil Liability Act 2002*, with sections 87CD – 87CI of the TPA being word-for-word identical of sections 35 - 39 of the *Civil Liability Act 2002*. Sections 87CB and 87CC, although closely mirroring sections 34 and 34A, are slightly different, and for that reason are set out below.

82 Actions for damages

(1B) Despite subsection (1), if:

(a) a person (the *claimant*) makes a claim under subsection (1) in relation to:

(i) economic loss; or

(ii) damage to property;

caused by conduct of another person (the *defendant*) that was done in contravention of section 52; and

(b) the claimant suffered the loss or damage:

(i) as a result partly of the claimant's failure to take reasonable care;
and

(ii) as a result partly of the conduct referred to in paragraph (a); and

(c) the defendant:

(i) did not intend to cause the loss or damage; and

(ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

Note: Part VIA also applies proportionate liability to a claim for damages under this section for a contravention of section 5287CB
Application of Part

S87CB – Application of part

(1) This Part applies to a claim (an *apportionable claim*) if the claim is a claim for damages made under section 82 for:

(a) economic loss; or

(b) damage to property;

caused by conduct that was done in a contravention of section 52.

(2) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

(3) In this Part, a *concurrent wrongdoer*, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

- (4) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).
- (5) For the purposes of this Part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

87CC Certain concurrent wrongdoers not to have benefit of apportionment

- (1) Nothing in this Part operates to exclude the liability of a concurrent wrongdoer (an ***excluded concurrent wrongdoer***) in proceedings involving an apportionable claim if:
 - (a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or
 - (b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.
- (2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Part) are relevant.
- (3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.

Apportionable claims

Apportionable claims under the *Civil Liability Act* 2002 (“CLA”), the TPA, the *Corporations Act* 2001 and the ASIC Act are all limited to claims for damages for economic loss or damage to property. The CLA further limits claims by expressly excluding “any claim arising out of personal injury”.

Civil Liability Act

To be an apportionable claim under the CLA, the claim must also be one “arising from a failure to take reasonable care, but not including any claim arising out of personal injury” or a claim under s 42 of the *Fair Trading Act* 1987 (NSW) (“FTA”).

To be an apportionable claim under the TPA, ASIC Act or *Corporations Act* 2001, the claim must be for damages for conduct in contravention of the section in the Act in question prohibiting misleading and deceptive conduct. As these Commonwealth Acts have their own proportionate liability regime, State Acts such as the CLA do not apply with respect to claims made under the TPA, ASIC Act and Corporations Act which are not caught by the proportionate liability regimes in those Acts: see *Dartberg Pty Ltd v Wealth Care* [2007] FCA 1216 which dealt with the exclusion of the Wrongs Act 1958 (Vic), the Victorian equivalent to the CLA.

In *Woods v De Gabriele* [2007] VSC 177, a plaintiff sought to amend a claim to plead a breach of a duty of “due skill and diligence”, rather than “reasonable care and skill” as then pleaded. The amendment was an effort to make the claim non-apportionable. Hollingworth J held at [58] that it was at least arguable that the claim was apportionable “if the facts on which the claim is based include allegations of a failure to take reasonable care, whether or not the plaintiff chooses to give it that name. In other words, it is arguable that an apportionable claim is a claim for economic loss or damage to property that arises, on the facts, from a failure to take reasonable care.”

Middleton J in *Dartberg Pty Ltd v Wealth Care* [2007] FCA 1216 at [30] stated:

Where a claim brought by an applicant does not have as one of its necessary elements any allegation of failing to take reasonable care, an additional enquiry into the failure to take reasonable care may become relevant in the course of a trial to determine the application of Pt IVAA. Even though the claims in this proceeding themselves do not rely upon any plea of negligence or a "failure to take reasonable care" in a strict sense, a failure to take reasonable care may form part of the allegations or the evidence that is tendered in the proceedings. At the end of the trial, after hearing all the evidence, it may be found that Pt IVAA applies.

In *Reinhold v New South Wales Lottery Corporation (No.2)* [2008] NSWSC 187, Barrett J at [29] quoted the above passage in *Dartberg Pty Ltd v Wealth Care Planning Pty Ltd* and then proceeded at [30] to state:

I respectfully agree that a claim may properly be regarded as one “arising from a failure to take reasonable care” if, “at the end of the trial”, the evidence warrants a finding to that effect and regardless of the absence of “any plea of negligence or a ‘failure to take reasonable care’”. The nature of the claim, for the purposes of Part 4, is to be judged in the light of the findings made and is not determined by the words in which it is framed.

Middleton J in *Dartberg* at [31] went on to outline how a case would proceed in which a plaintiff did not plead failure to take reasonable care, but the defendant insisted the claim was apportionable on this basis:

In these circumstances, where a respondent desires to rely upon Pt IVAA of the Wrongs Act, it will need to plead and prove each of the statutory elements, including the failure to take reasonable care. In a proceeding where the applicant does not rely upon any such failure, then the need for a particularised plea by a respondent may be particularly important for the proper case management of the proceedings: see eg *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367 at [41]. It would be desirable at an early stage of proceedings for a respondent to put forward the facts upon which it relies in support of the allocation of responsibility it contends should be ordered. If a respondent calls in aid the benefit of the limitation on liability provided for in Pt IVAA of the Wrongs Act, then the respondent has the onus of pleading and proving the required elements. The court, after hearing all the

evidence, will then need to determine, as a matter of fact, whether the relevant claim brought by the applicant is a claim arising from a failure to take reasonable care.

In *Solak v Bank of Western Australia* [2009] VSC 82, in determining whether or not a proceeding related to an apportionable claim under Part IV AA of the *Wrongs Act* (and similar regimes), Pagone J stated (at [35]):

the factual precondition to the operation of the relevant statutory regimes does not depend upon how a claim is pleaded but whether the statutory precondition exists, namely whether the claim arises from a failure to take reasonable care. In *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* [2007] FCA 1216;164 FCR 450 Middleton J said that the words arising from the failure to take reasonable care should be interpreted broadly. In my view the State regimes providing for the apportionment of liability between concurrent wrongdoers require a broad interpretation of the condition upon which the apportionment provision depends to enable courts to determine how the claim should be apportioned between those found responsible for the damage. The policy in the legislation is to ensure that those in fact who caused the actionable loss are required to bear the portion of the loss referable to their cause. That task ought not to be frustrated by arid disputes about pleadings.

It is clear from the above passages that the key test for apportionability in alleged cases of “failure to take reasonable care” under the CLA, not how the claim is pleaded by the plaintiff. The test would appear to be whether, at its heart, the claim is based on the failure of the defendant (or at least of somebody for whose conduct the defendant is responsible) to take reasonable care.

Trade Practices Act

Under TPA s 87CB, a claim is apportionable if it is “a claim for damages made under section 82 for (a) economic loss; or (b) damage to property; caused by conduct that was done in contravention of section 52”. It should be noted that the section is not worded to refer to “a claim for contravention of section 52” but “a claim... caused by conduct that was done in contravention of section 52”. Thus it would seem that the same approach to construction of CPA s 34 discussed above should be applied to the construction of TPA s 87CB- it matters not whether TPA s 52 is expressly pleaded, what matters is whether the claim is one that can be properly characterised as caused by conduct which is misleading and deceptive.

An example of a claim which, although not pleaded under s 52, would likely be considered an apportionable claim by reason of being a claim caused by conduct that was done in contravention of s 52, would be a claim under TPA s 53. Section 53 prohibits certain particular representations in connexion with the supply or possible supply of goods and services, including representations as to the standard, quality, value or price of the goods. It is hard to conceive of any conduct prohibited by s 53 that would not also be a breach of s 52. The purpose of s 53 in the TPA (apart from drawing extra attention to

certain particularly invidious types of misrepresentations) would seem to lie in the fact that contravention of s 53 is an offence, but contravention of s 52 is not. Assuming the relevant breach of s 53 was also a breach of s 52, the conduct in question would surely be “conduct that was done in contravention of section 52” and hence apportionment of liability would apply.

Claims in Contract

Although to be apportionable under the CLA the claim must be one “arising from a failure to take reasonable care”, that does not mean that the claim must be pleaded in negligence. For example, a claim for breach of a contractual duty of care is a claim “arising from a failure to take reasonable care”, and hence apportionable: see *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463.

In *Reinhold v New South Wales Lottery Corporation (No.2)* [2008] NSWSC 187 it was argued (at [25]) that the claim for breach of contract was not one “arising from the failure to take reasonable care”. The relevant contractual term was concerned with the fact of cancellation, regardless of questions of want of care. A claim under the CLA could only be made in respect of a breach of a contractual term which expressly or impliedly required that reasonable care be taken. Barrett J (at [26]) found that there was a breach of the relevant contractual term because of conduct entailing want of care amounting to a breach of a duty of care in negligence. His Honour concluded (at [26] –[27]):

The breaches of contract to which the cancellation of Ticket B gave rise were of the same character as the negligence. Each had as its central element failure to take reasonable care. The case was thus one in which each relevant “claim”, as determined by the court and according to the findings actually made, was a claim in an action for damages “arising from” the failure to take reasonable care that was also at the centre of the tortious claim in negligence. This is so of both the claims in tort and the claims in contract. That, in my view, is sufficient to bring the contract claims, as well as the tort claims, within s 34(1)(a) and it makes no difference that the breaches of contract, as alleged, were not framed in terms of failure to take reasonable care.

A claim for damages for breach of a contractual term which has nothing to do with taking reasonable care is not apportionable (see *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45). A claim based upon the breach of a fiduciary duty would presumably also fall outside the category of apportionable claims (being based not on a failure to take care but upon the lack of good faith by the defendant), unless a concurrent liability existed in negligence or for breach of a contractual duty to take care.

The proportionate liability provisions apply to a contractor who breaches a contractual duty to ensure that a subcontractor’s work is done properly (see *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463).

Claims pursuant to guarantees

In *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45, the Victorian Court of Appeal considered s 24AE of Part IVAA of the Wrongs Act, the Victorian equivalent to CLA s 34. The Commonwealth Bank sued a guarantor on his guarantee.

The guarantor, a Mr Witherow, asserted that the claim was apportionable as he had only entered into the guarantee as a result of the negligence of his accountant, Mr Dennington. The Court rejected that argument, Maxwell P stating at [9]-[11]:

[9] Under s.24AE in Part IVAA, the term "apportionable claim" is defined to mean "a claim to which this Part applies". In turn, sub-s.24AF(1) relevantly provides that

–

"(1) This Part applies to –

- (a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care ..."

[10] The Bank's claim is not a claim in an action for damages. It is a claim in an action for a sum certain, namely – as set out in the statement of claim – \$150,606.90.

[11] Less still is the Bank's claim made "in an action for damages ... arising from a failure to take reasonable care". The Bank sues on a guarantee. It seeks, in effect, specific performance of the contract of guarantee. No question of failure to take reasonable care arises in that claim, or could possibly arise. It is understandable that Mr Witherow has wanted to join, and has now joined, his accountant, Dennington, as a third party, on the ground that her negligence - as he says it was - in failing to advise him accurately of the financial position of the borrower company has resulted in his exposure to loss pursuant to the calling up of the guarantee. But for present purposes, the proposed seeking by Mr Witherow of contribution from Dennington is wholly irrelevant.

Thus a term of a guarantee which requires money to be paid if the principal debtor defaults does not, without more, satisfy the requirements of an apportionable claim.

Claims pursuant to liquidated damages clauses

Liquidated damages clauses do not found causes of action, but merely purport to fix the damages for the breach of a contractual duty (and are effective in doing so except in cases they are void as a penalty). Only in cases where the breach is in relation to an apportionable claim (for example, a failure to observe a contractual duty of reasonable care) can a liquidated damages clause potentially impact on apportionment. This situation is likely to be very rare in practice.

Assuming the unlikely case of an apportionable claim founding a breach of contract which is covered by a liquidated damages clause, only those concurrent wrongdoers who were parties to the contract could be affected by the clause. Presumably the result would be that the contractual liability of those contracting wrongdoers would be adjusted by the proportion for which each was liable for the plaintiff's loss.

By way of illustration, imagine there are two concurrent wrongdoers being sued by a plaintiff for failure to take reasonable care, and that the court finds that each is 50% responsible. Imagine the plaintiff's actual loss from the failure to take care is \$60,000. If one wrongdoer (but not the other) had agreed with the plaintiff to pay liquidated damages of \$100,000 for breaching its duty to take care, then that wrongdoer would pay \$50,000 damages to the plaintiff (being 50% of \$100,000), and the second wrongdoer would pay \$30,000, being 50% of the plaintiff's actual loss, so the plaintiff would receive \$80,000 in total. If instead the first wrongdoer (but not the second) had agreed with the plaintiff to pay liquidated damages of \$40,000 for breaching its duty to take care, then the first wrongdoer would pay \$20,000 damages to the plaintiff (being 50% of \$40,000), and the second wrongdoer would pay \$30,000, for a total of \$50,000 paid to the plaintiff.

Concurrent wrongdoer

CLA s 34(2) defines "concurrent wrongdoer" as "a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim". Thus the expression "concurrent wrongdoer" is defined more widely than the common law concept of concurrent wrongdoer previously discussed, as the statutory test is whether the same damage was caused by the various wrongdoers, rather than the narrower common law test of whether a particular injury was inflicted by the wrongdoers.

A defendant seeking to limit liability under proportionate liability provisions bears the onus of pleading and proving that it is a concurrent wrongdoer: *Ferdinand Nemeth v Prynew Pty Limited* [2005] NSWSC 1296 at [17]; *Ucak v Avante Developments* [2007] NSWSC 367.

There is no statutory compulsion under the CLA for either plaintiff or defendant to join all concurrent wrongdoers. Under CLA s 35A a defendant has a duty to inform the plaintiff as soon as practicable of the details of other concurrent wrongdoers, but the only penalty imposed by that section for failure of a defendant is that the defendant may be ordered to pay any costs incurred by the plaintiff as a result on an indemnity basis. In view of the need of the defendant to plead and prove any proportionate liability defence, however, the defendant will need to identify the other concurrent wrongdoers in its Defence in any event.

Under CLA s 35(3), "the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings", and the same rule applies for the TPA proportionate liability regime. This provision contrasts with the equivalent provisions in Western Australia, South Australia and Tasmania where the court "must"

take into account the comparative responsibility of non-party wrongdoers. One would presume that the “may” in the NSW (and Commonwealth) legislation means that if the defendant pleads the existence of a non-party concurrent wrongdoer then the court will take that wrongdoer’s responsibility into account, but that in the absence of such a pleading the court will ignore the non-party wrongdoer.

CLA s 34(4) states “For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died”. Thus the fact that a plaintiff has no practical likelihood of ever recovering damages from a concurrent wrongdoer does not diminish the effect of the existence of that wrongdoer on the proportionate liability of other, more solvent, wrongdoers.

Normally a plaintiff will wish to join as defendants in the one set of proceedings all solvent persons who are alleged with any degree of plausibility by an existing defendant to be concurrent wrongdoers so that if this contention proves correct, the plaintiff can obtain judgments against each of those other wrongdoers for its proportionate share of the plaintiff’s loss. Although CLA s 37 expressly preserves the right of a plaintiff to initiate subsequent proceedings against other concurrent wrongdoers, such wrongdoers will not be bound by the findings in the first proceedings and it is open to them to submit that their proportionate responsibility is less than that determined in the previous proceedings.

The plaintiff is likewise not limited by the previous decision, but as s 37(2) restricts the plaintiff from recovering in the two proceedings combined more than the plaintiff’s overall loss the plaintiff’s potential advantage from separate proceedings is limited, and outweighed by the disadvantages (from the plaintiff’s perspective).

Unidentified concurrent wrongdoers

A defendant who seeks to rely on the proportionate liability provisions of the CLA must identify the concurrent wrongdoer in the defence with a degree of specificity that would enable a plaintiff to bring an action against the concurrent wrongdoer: see *Perpetual Trustee Company Limited v Kotevski* [2009] NSWSC 954 at [7]; *HSD Co Pty Ltd v Masu Financial Management Pty Ltd* [2008] NSWSC 1279 at [18]; *Ucak v Avante Developments* [2007] NSWSC 367 at [35].

Causation and the concurrent wrongdoer

Causation of damage is an essential element in making out a claim of proportionate liability against a concurrent wrongdoer.

A defendant must specify in its defence the causal connection between the conduct of the concurrent wrongdoer and damage said to be suffered by the plaintiff in the substantive proceedings: see *Perpetual Trustee Company Limited v Kotevski* [2009] NSWSC 954 at [7]; *HSD Co Pty Ltd v Masu Financial Management Pty Ltd* [2008] NSWSC 1279 at [18].

In light of the decision in *Perpetual Trustee Company Limited v Kotevski* [2009] NSWSC 954 a causal connection between the conduct of the concurrent wrongdoers and the

damage suffered by a cross-claimant may be sufficient, although it is not the same damage as that suffered by the plaintiff.

Where the conduct of the concurrent wrongdoer constitutes a “necessary condition” of the economic loss or damage suffered by the plaintiff the element of causation will be made out for the purposes of s 5D(1) of the *Civil Liability Act*: see *Reinhold* at [15].

In *Reinhold* Barrett J discussed the element of causation in the context of determining what is “just” apportionment, with regard to the relative responsibility of concurrent wrongdoers. His Honour considered the case of *Madden v Quirk* [1989] 1 WLR 702 concerning the concept of responsibility pursuant to the United Kingdom equivalent of Part 3 of the Law Reform (Miscellaneous Provisions) Act 1965 (NSW). In particular, Simon Brown J said (at 707) that responsibility involved “considerations both of blameworthiness and of causative potency” (see also *Elliott v Lavery* [2006] NIQB 97). His Honour envisaged a cases where (at [45]):

... a party’s “more serious fault” has “less causative impact” than the other’s “less serious fault” so that both are held equally responsible: *Downs v Chappell* [1996] 3 All ER 344 at 363.

In that respect, the statutory responsibility of a concurrent wrongdoer for loss occasioned to the plaintiff encompasses wider considerations than the application of the traditional ‘but for’ test of causation, and wider also than the common sense approach to causation favoured by the Courts in cases involving multiple causative vectors.

Barrett J also quoted with approval from the judgement of Tuckey LJ in *Resource Amercia International Ltd v Platt Site Services and Barkin Construction Ltd* [2004] EWCA Civ 665 at [51] (approved in *Brian Warwick Partnership v Hok International Ltd* [2005] EWCA Civ 962) with respect to the width permitted by “having regard to” what is “just and equitable” when considering “responsibility”, as follows (at [46]):

Section 2 of the 1978 Act is not expressed exclusively in terms of causative responsibility for the damage in question, although obviously the court must have regard to this, as the section directs, and it is likely to be the most important factor in the assessment of relative responsibility which the court has to make. But in the result the court’s assessment has to be just and equitable **and this must enable the court to take account of other factors as well as those which are strictly causative.** [emphasis added]

Blameworthiness and causative potency are co-determinants of responsibility under the proportionate liability provisions of the CLA. In some cases it may be that the conduct that causes the loss or damage is of diminished importance when apportioning responsibility in comparison to the culpability of a concurrent wrongdoer in terms of either the financial benefit received or degree of departure from the standard of care of the reasonable person (see *Reinhold* at [48], [50]-[52], esp. at [57] and [76]; *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492 at 494; *Vinidex Tubemakers Pty*

Ltd v Thiess Contractors Pty Ltd [2000] NSWCA 67 at [29]; *Ghunaim v Bart* (2004) Aust Torts Reports 81-731 at [71]; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 872 [28]; see also *Yates v Mobile Marine repairs Pty Ltd* [2007] NSWSC 1463 at [94]; *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 at [51]).

In *Yates*, Palmer J (at [97]) considered that an enquiry as to which of the concurrent wrongdoers was more actively engaged in the conduct causing loss and which was more able to effectively prevent the loss was relevant to the task of apportioning responsibility.

It is therefore the whole conduct of each concurrent wrongdoer that is examined in the process of apportionment, with causation being but one (albeit necessary) factor to be taken into account by the Court in making a final determination as to comparative responsibility for loss suffered by the plaintiff.

Must a Concurrent Wrongdoer have an existing liability to the Plaintiff?

A more important question is whether a party which is not itself liable to the plaintiff can ever fall within the definition of “concurrent wrongdoer”. There is no express requirement in the CLA or TPA for a concurrent wrongdoer to be liable to the plaintiff, but unless such a requirement existed (or the proportionate liability legislation itself created a statutory right against such concurrent wrongdoers), the plaintiff would be left in the position where it could not even bring a suit for a large part of its loss as it lacked any cause of action against some of those persons who were partly responsible. Further the word “wrongdoer” itself implies that the person in question has committed some form of actionable wrong against the plaintiff.

More persuasive still, the concept of “concurrent wrongdoer” was originally inspired by the concept of “joint tortfeasor” in s 5 of the Law Reform (Miscellaneous Provisions) Act 1946, which contains a contribution regime between person who have jointly committed a tort against the same plaintiff. Clearly in the case of joint tortfeasors the idea of there being a wrong committed by the person in question was central to the concept of a “joint tortfeasor”, and so it would be very surprising if there was no similar requirement in the successor concept of “concurrent wrongdoer”.

The following cases have considered the question.

In *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45, Maxwell P stated at [14]:

It would, of course, be impossible to make an apportionment between, on the one hand, Mr Witherow’s liability in contract to the Bank and, on the other, the liability of Dennington in tort to Mr Witherow. Plainly, Parliament did not have in mind when it enacted Part IVAA that the Court could be asked to take into account in an action such as this, on a contract of guarantee, the fact that the guarantor has a claim in negligence against a third party on whose advice he relied in giving the guarantee.

Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd [2007] FCA 1216 commented on *Witherow* at [40]

... it seems to me that the concurrent wrongdoers must each have committed the relevant legal wrong against the applicant. This conclusion seems to be implicit in the reasoning of the Court of Appeal in *Witherow* [2006] VSCA 45, although the issue does not appear to have been addressed specifically.

Besanko J in *Shrimp v Landmark Operations Limited* [2007] FCA 1468 at [59] considered this point:

As the submissions were developed it became clear that Selected Seeds was contending that although the cross-respondents or one or more of them could be concurrent wrongdoers under s 87CB(3) even though they were not liable to the applicants under the substantive law, the effect of the proportionate liability provisions was that the applicants were given a right of recovery against such cross-respondents as fell within s 87CB(3). That construction would involve a significant alteration of the substantive law. In my opinion, however the argument is put it must be rejected because clear words would be required before one would accept a construction involving such a substantial erosion of a plaintiff's rights or a change in the substantive law as to the circumstances in which one party is liable to another. There are no such clear words in the provisions and there is no other indication that Parliament intended to change the law so radically or why it would be considered appropriate to do so.

In *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694, Bryson AJ at [111] stated that "s 34(2) of the *Civil Liability Act* impliedly requires" a concurrent wrongdoer to be liable to the plaintiff.

See also *Fletcher Insulation (Vic) Pty Ltd v Renold Australia Pty Ltd* [2006] VSC 269, *Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No.12)* [2007] VSC 377 and *Atkins v Interprac Financial Planning Pty Ltd & Anor* [2007] VSC 445, which all proceed on the basis that a concurrent wrongdoer must have an existing liability to the plaintiff for the wrong in question.

Ucak v Avante Developments [2007] NSWSC 367 is the only authority arguably against the proposition that a person cannot be a concurrent wrongdoer without an existing liability to the plaintiff for its wrong, but that is only because in a stated list of matters required to be pleaded by a defendant alleging limitation of liability by apportionment Hammerschlag J provides at [35] does not include a pleading that the concurrent wrongdoer is liable to the plaintiff, instead identifying the required matters as follows:

- (a) the existence of a particular person;
- (b) the occurrence of an act or omission by that particular person; and
- (c) a causal connection between that occurrence and the loss that is the subject of the claim.

This inference by omission is a very weak one, particularly in view of the fact that there was no argument in that case concerning whether liability to the plaintiff was a precondition of becoming a concurrent wrongdoer.

In *HSD Co Pty Ltd v Masu Financial Management Pty Ltd* [2008] NSWSC 1279 concerning an application to amend to add several concurrent wrongdoers to a defence, Rothman J stated there were three essential requirements (at [7]):

- (a) the identity of the concurrent wrongdoer
- (b) the basis for the cause of action – if it be contract, identify the contract; if it be tort, identifying the duty, its scope and the breach; and
- (c) the damage – the aspects of causation; the alleged extent and proportion of the damages, and damage said to be suffered by the plaintiff in the substantive proceedings.

Rothman J's choice of words in (c) of "damage said to be suffered by the plaintiff" strengthens the view that a common plaintiff is required for an apportionable claim. That is consistent with the necessity of a common plaintiff in a claim for contribution: see *Alexander v Perpetual Trustees WA Limited* [2004] HCA 7 dealing with the *Wrongs Act 1958* (Vic).

Thus the authorities strongly confirm that a person cannot be a concurrent wrongdoer unless they have an existing liability to the plaintiff for their concurrent wrong, even though there is no express statement to that effect in any of the proportionate liability legislation.

The Position with Respect to Cross-Claims

In *Perpetual Trustee Company Limited v Kotevski* [2009] NSWSC 954, Schmidt J could not accept the plaintiff's argument that a defence to a cross-claim must specify a cause of action that the plaintiff (as opposed to the cross-claimant) has against the concurrent wrongdoer. The plaintiff relied upon the approach of Rothman J in *HSD* who stated (at [17]) that:

The proportionate liability provisions allow the defendant to allege a cause of action by the plaintiff against the concurrent wrongdoer.

Reliance was also placed on what Hammerschlag J said in *Ucak* at [34]-[37] (see above).

Schmidt J held that the cross-defendant's pleading which alleged that the Plaintiff was a concurrent wrongdoer as against the cross-claimant was (at [11]):

... entirely consistent with what is contemplated by s 35 and does not depend on Perpetual [the Plaintiff] itself having a cause of action against each other wrongdoer.

In light of that decision the proportionate liability provisions can be seen to extend to cross-claims made by defendants in which the plaintiff is the concurrent wrongdoer in respect of damage suffered by the cross-claimant.

In *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510 concerning the comparable provisions of Part VIA of the TPA, Besanko J observed (at [62]):

...the mischief to which the amendments were directed was a plaintiff being able to recover 100% of his damages from any one of several wrongdoer's when that wrongdoer's 'fault', when compared with the other wrongdoers, was less or far less than that. In other words, the amendment was directed to what were considered to be the undesirable consequences of the joint and several liability rule. There is no suggestion that the mischief the amendments were designed to remedy was any wider than that. The definition of concurrent wrongdoer seems to be the critical subsection and, in my opinion, the word 'caused' in s 87CB(3) should be read as meaning such as to give rise to a liability in the concurrent wrongdoer to the plaintiff or applicant.

That view is reconcilable with the view expressed by Schmidt J that the same damage as that alleged by a cross-claimant is apportionable as between cross-defendants, including where a cross-defendant is also a plaintiff in the proceedings.

The concept of "the same damage"

In *St George Bank Limited v Quinters Pty Ltd* [2009] VSCA 245, Nettle J (at [63]) noted the different language used in 24AH and 23B of the *Wrongs Act* wherein the former requires loss or damage to be apportioned between persons "being liable in respect of the same damage" as opposed to the latter which requires loss or damage to be apportioned between persons "whose acts or omissions caused... the loss or damage that is the subject of the plaintiff's claim". His Honour reasoned that a person would not be liable for the plaintiff's loss or damage if that person's acts or omissions has not caused the same loss or damage. His Honour concluded (at [64]) that loss or damage that is the subject of the plaintiff's claim is "the same damage" for the purposes of an apportionable claim.

Section 34(1)(A) of the CLA is similarly worded to s 24AH of the *Wrongs Act* in that it refers to "the same damage", and 34(2) of the CLA is similarly worded to 23B. Nettle JA's reasoning in *St George* is therefore equally applicable to the parallel provisions of the CLA.

In *Alexander v Perpetual Trustees WA Ltd* [2004] HCA 7; (2004) 216 CLR 109 the High Court considered what the "same damage" meant in s 23B of the *Wrongs Act* and decided that it is a narrower concept than liabilities arising out of the same transaction or related transactions. The High Court majority referred with approval to the House of

Lords decision in *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14; [2002] 1 WLR 1397 and stated (at CLR 122 [26]-[27]):

In *Royal Brompton Hospital*, Lord Bingham of Cornhill said of the UK Act:

When any claim for contribution falls to be decided the following questions in my opinion arise. (1) What damage has A suffered? (2) Is B liable to A in respect of that damage? (3) Is C also liable to A in respect of that damage or some of it?

Translated to the present appeal, A represents the plaintiffs, B the respondents, and C Minters.

Where a person has suffered damage in connection with some transactions or events involving the wrongful conduct of others, the statutory creation of rights of contribution between the wrongdoers seeks to address the injustice that may result in some cases if the victim, by his or her selection of defendants, could throw the burden of liability on to one or some of the wrongdoers, to the exclusion of the others. A policy of preventing or limiting such injustice will require a legislature to make choices between different methods of giving effect to that policy. Those choices will be reflected in the terms of the legislation. The Act directs attention to a common liability by using in s 23B the expression ‘in respect of the same damage’. This is a narrower concept than that of liabilities arising out of, or by reason of, the same transactions or related transactions. In resolving questions of construction of the legislation, it is not to be assumed that the legislative purpose is always to provide the widest possible sharing of liabilities, actual or potential, real or hypothetical.

In *Royal Brompton* it was held that the hospital’s claim for damages against the architect for negligent issue of extension certificates was not the same damage that the hospital sought as against the builder for delay. The architects claim for contribution from the builder was therefore justifiably struck out as it was not a claim in respect of the same damage. It may be concluded that the concept of the same damage as discussed by the High Court is inextricably tied to the element of causation (see *St George Bank Limited v Quinters Pty Ltd* [2009] VSCA 245 at [72]).

In *St George Bank Limited v Quinters Pty Ltd*, Nettle JA rejected an argument by a defendant valuer (who admitted to negligently overvaluing the security against which a loan was made) to the effect that that the damage suffered by the lender was the same damage as that caused by the borrower and guarantor in failing to repay the loan. In so concluding his Honour undertook an extensive review of the relevant authorities, including in particular *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 and the authorities relied on in that case by Young CJ in Eq (as his Honour then was). Nettle JA concurred with Counsel’s observation that his conclusion was at odds with that of Young J. Specifically, Nettle JA disagreed that the damage caused by the mortgage fraudster in *Vella* was the same damage suffered by the lender who was left without security as a result of the negligence of the lender’s solicitors in failing to draft a mortgage that

protected against the same kind of loss. His Honour (at 87) contrasted the decision in *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694; 13 BPR 24,675; (2007) Aust Torts Rep 81-896 in which a solicitor's negligent breach of duty resulted in a fraudster obtaining a new duplicate certificate of title and the lender advancing funds on the faith of a fraudulent mortgage.

The reasoning of Young J in *Vella* is more persuasive (as well as binding on lower courts within NSW) and consistent with the Court of Appeal's reasoning in *Bracks v Smyth-Kirk* [2009] NSWCA 401 concerning the meaning of "damage" in s 5(1)(b) of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW). The Court of Appeal considered *Alexander v Perpetual Trustees WA Ltd* [2004] HCA 7; (2004) 216 CLR 109 and *Mahony v J Kruschich (Demolitions) Pty Ltd* [1985] HCA 37; (1985) 156 CLR 522 and accepted (at [116]) that "damage" meant "the same damage" in the contribution provision. The Court of Appeal concluded (at [118], [121]) that the key concept was common liability irrespective of whether the damage suffered could be categorised as coming under a single or several heads of damage.

Joinder of non-party concurrent wrongdoers and procedural difficulties

Sections 35(3) and 35(4) of the CLA enable the Court to carry out the process of apportionment having regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

The requirement to plead with specificity the identity of the concurrent wrongdoer, the basis of the cause of action, and the damage (including aspects of causation), are intended to put the plaintiff in a position to be able to seek leave to join a concurrent wrongdoer. A pleading of joint, concurrent or several tortfeasors usually gives rise to a right of amendment as in cases concerning contribution or indemnity, subject to the relevant rules of the Court as to joinder (see *Bracks v Smyth-Kirk* [2009] NSWCA 401). The same may be said in respect of a defence which identifies a concurrent wrongdoer.

In *Main Road Property Group Pty Ltd v Pelligra & Sons Pty Ltd* [2010] VSC 5, in considering a defendant's application to join a non-party for the purpose of an apportionable claim, Croft J identified the risk of prejudice in determining on a final basis whether the proposed defendant was in fact a concurrent wrongdoer prior to the final hearing. In granting the application his Honour noted (at [12]):

...if a defendant fails to ensure that any other person against whom he, she or it seeks to apportion responsibility is not joined in the proceedings this failure is at the existing defendant's peril. This is because any responsibility apportioned to the existing defendant will not be reduced to any extent as a result of the responsibility of any person not joined in the event that they would otherwise have been subject to an apportionment of liability.

The same result would not, however, apply in NSW as the provisions of the CLA (sections 35(3), 35(4) and 38) go further than Croft J envisaged in respect of the Victorian equivalent. Section 24AI(3) of the *Wrongs Act* (Vic) provides:

In apportioning responsibility between defendants in the proceeding the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up.

The requirement for joinder of a non-party under s 24AI(3) of the *Wrongs Act* (Vic) raises a procedural obstacle which is absent under CLA. Pursuant to s 38(1) of the CLA the Court may give leave to join a non-party concurrent wrongdoer, but unlike the case in Victoria, there is no requirement in NSW for a concurrent wrongdoer to be joined to proceedings for their proportionate share of the plaintiff's loss to be taken into account.

Claims for contribution or indemnity

The effect of s 36 of the CLA is to exclude cross-claims for contribution or indemnity in relation to damages paid to the plaintiff against other defendants who are themselves the subject of a judgment for by reason of being a concurrent wrongdoer in relation to damages paid to the plaintiff: see *Reinhold v New South Wales Lottery Corporation (No.2)* [2008] NSWSC 187 at [85]. This is to prevent a concurrent wrongdoer having to pay double by being liable both to a plaintiff for his proportionate share and to a concurrent wrongdoer in contribution.

It should be noted that although *Ginelle Finance Pty Ltd v Diakakis* [2007] NSWSC 60 was decided in 2007, the events giving rise to the claims occurred in 2000, being before the 26 July 2004 date for operation of the CLA proportionate liability regime, and for that reason the case involved contribution claims between concurrent wrongdoers rather than the raising of proportionate liability defences under that Act.

In *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 at [601]-[613] Young CJ in Eq considered the effect of s 36, and having already made an apportionment under s 35 of the CLA, proceeded to hold that the defendant firm of solicitors (Hunt & Hunt) was entitled to indemnity from a joint tortfeasor (Mr Flammia) for the solicitors' share of the apportioned liability (12.5%). The claim for indemnity was on a triple basis of a claim pursuant to s 5 of the *Law Reform Miscellaneous Provisions) Act 1946*, a claim under s 42 of the *Fair Trading Act* for misleading and deceptive conduct, and a claim under s 12GF of the *ASIC Act* for the same misleading and deceptive conduct. At [603] his Honour stated as follows with respect to contribution:

Because I have made an apportionment under s 35 of the *Civil Liability Act, 2002*, s 36 of that Act operates to bar part of any proceedings for contribution. Thus the only claim is in respect of the 12.5% for which they are directly liable to Mitchell Morgan. Hunt & Hunt submit that, in the circumstances, they are entitled to recover from Mr Flammia the whole of that liability.

His Honour then proceeded to award indemnity for Hunt and Hunt against Mr Flammia for the full 12.5% under all three claims, thus holding that a claim for contribution was

available against him. Although that might seem at first glance to be contrary to s 36 of the *Civil Liability Act* being an award of contribution against a concurrent wrongdoer, but the facts in *Vella* were very unusual as Mr Flammia was a bankrupt and presumably for that reason the plaintiff had not sued him, although Hunt & Hunt had obtained leave from the Federal Court to proceed against him as a cross-defendant for contribution and indemnity. In the circumstances, with no judgment sought by the plaintiff against Mr Flammia, s 36 was not activated and the court was thus free to order that Mr Flammia contribute to and indemnify Hunt & Hunt with respect to their 12.5% share.

Contributory Negligence

Section 35(3)(a) of the CLA excludes the negligence of the plaintiff in assessing apportionment between concurrent wrongdoers: see *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 at [587].

However, the principles of apportionment applied in cases of contributory negligence have been adopted in respect of the process of apportionment according to what is just in having regard to the relative responsibility of concurrent wrongdoers (see below under the heading ‘Just apportionment’).

Intentional and fraudulent wrongdoers

An intentional or fraudulent wrongdoer is excluded by the operation of CLA s 34A from the benefit of proportionate liability. If, however, one concurrent wrongdoer acted intentionally or fraudulently and a second did not, the first wrongdoer’s liability is not limited by apportionment, but the second wrongdoer can claim apportionment in the normal fashion: see *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694; (2007) 13 BPR 24,675 at [111]; also *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 at [600]. (See further below under the heading ‘Just apportionment’).

Intentional wrongdoers and gross negligence

As noted above, intentional wrongs are excluded from claims under the CLA. With respect to gross negligence, the High Court in *R v Lavender* (2005) 222 CLR 67 has held that there is no element of intentionality involved in the assessment of conduct that departs so far from the standards of a reasonable person that it may be termed ‘gross negligence’. In light of *Lavender*, there is no reason why a defendant found responsible for causing loss to the plaintiff by gross negligence could not claim the benefit of the proportionate liability provisions under the CLA.

Claims for equitable damages

Damages are not awarded in equity (which instead awards “compensation” when money is ordered to be paid by reason of an equitable cause of action), save in the instance of an application being made for an injunction which is refused on discretionary grounds and damages awarded in lieu. Thus “equitable damages” only arise in this very limited context.

One would think that a claim for “economic loss” in “an action for damages” under the CLA would not cover an equitable claim for compensation (which is not correctly termed “damages”), but could potentially include an action for equitable damages, properly so called.

In *Reinhold v NSW Lotteries Corporation (No 2)* [2008] NSWSC 187 Barrett J (at [9]) referred to but did not answer the question of whether claims for economic loss in an action for damages under the CLA included claims for equitable compensation.

Subsequently, in *Perpetual Trustee Company Limited v Kotevski* [2009] NSWSC 954 Schmidt J accepted (at [16]) that the CLA did not apply to a claim for equitable compensation, but without discussing the proposition at any length.

In contrast, in *Main Road Property Group Pty Ltd v Pelligra & Sons Pty Ltd* [2010] VSC 5, Croft J (at [29]) expressed the opinion that it was at least arguable that claims for breach of fiduciary duty arising from a failure to take reasonable care were apportionable under s 24AF of the *Wrongs Act* (Vic). His Honour appears, however, to have considered only the question as to whether a claim for breach of fiduciary duty could be a claim for failure to take reasonable care, and no argument appears to have been put that the claim was not apportionable because it was not a claim for “damages”.

One thus cannot say that the authorities on this point are well settled, but it appears more likely than not that a claim for equitable compensation cannot be apportioned as it is not a claim for “damages”.

The blurring between debt and damages

As the decision in *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45 shows, a claim for damages is quite distinct from suing on a debt. Nevertheless, the enquiry as to when liability accrues for a negligent valuation can be seen to involve the blurring the distinction between debt and damages.

In *Ross v Cook* [2009] NSWSC 671 a loan and mortgage were entered into based upon a negligent valuation of the secured property. A claim of proportionate liability was made between concurrent wrongdoers under the CLA and TPA. It was necessary for the Court to determine whether the cause of action accrued before or after 26 July 2004, being the date when the proportionate liability provisions in the CLA became operative. Although the provisions are deemed to apply in respect of claims where liability accrued before 26 July 2004, the old procedure requiring cross-claims against persons alleged to be joint and several tortfeasors would have applied to a claim for which liability accrued before the operative date.

The question of when liability accrued gave rise in *Ross v Cook* to three possibilities (at [27]) as to when the loss was suffered: (i) that it accrued at the time when the loan was made, without sufficient security to recoup the loan by sale (not argued); (ii) at the time of default when the loss could be said to have crystallized (as submitted by the

defendant), or ; (iii) at the time when the sale of the mortgaged property was completed (as submitted by the plaintiff).

Davies J was asked to resolve an asserted conflict between authorities as to the correct test to apply given the High Court's decisions in *Kenny & Good Pty Limited v MGICA* (1999) 199 CLR 413 and *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640. In holding that the conflict was more apparent than real, Davies J (at [31]) adopted the same approach used in both cases which began with an enquiry as to the nature of the interest infringed by the negligent act.

In relation to a mortgage, the risk sought to be protected against by obtaining a valuation is the ability to recoup by sale of the property the debt owed under the mortgage. Davies J held (at [31]) that the interest in recoupment is infringed by the breach of duty. The time when recoupment is impossible is when liability accrues (at [36]). To paraphrase Gaudron J in *Kenny v Good* at [16], the time when the loss becomes reasonably ascertainable.

The lender's loss may be ascertainable as early as the time of default or as late as the sale of the property. An event of default is unlikely to result in an ascertainable loss which has been caused by the negligence of a valuer, where the interest of the lender that the lender aims to protect by obtaining a valuation is the recoupment of the mortgage debt, rather than to prevent default in the first place.

By contrast, from the purchaser's point of view there may be an ascertainable loss at the time of purchasing the property, where a negligent valuation causes too much money to be paid for a property, where the interest the purchaser aims at protecting through the valuation is the interest in paying market value.

It is clear from *Ross v Cook* that liability for a negligent valuation does not accrue at the time a loan and mortgage are entered into simply by virtue of the disjuncture between the loan amount and the value of the property secured. Nor does an event of default by itself constitute an ascertainable loss caused by a negligent valuation. The critical point is reached when recoupment has become impossible. To that extent, the distinction between debt and damages has become somewhat blurred in the inquiry as to when liability accrues for loss caused by a negligent valuation.

The significance of determining when liability accrues for a claim under the CLA was also highlighted in *Reinhold v NSW Lotteries Corporation (No 2)* [2008] NSWSC 187. Barrett J (at [19]) considered an argument that Pt IV of the CLA concerned "claims" and not liability as such. In his Honour's opinion, "claims" made under the CLA are referable to the sources of liability on which such claims are determined. Therefore it is an essential step in the course of determining a claim to decide when liability accrues. As Barrett J pointed out (at [21]) proportionate liability can only be judged after the loss or damage and its causes have been identified through a process of fact finding and analysis. Where liability is dependant on proof of "loss or damage that is the subject of the claim",

the distinction between damages and debt may become blurred in the fact finding process as shown above.

Notwithstanding the above, it is clear that if one is sued for the repayment of a debt there is no prospect of successfully defending the matter on the basis of a proportionate liability defence.

Forum Shopping to Avoid Proportionate Liability

It has been judicially recognized that despite their different forms, the requirements for proportionate liability of concurrent wrongdoers under Pt VIA of the *Trade Practices Act* and/ or the *ASIC Act* are similar to those under the CLA: *Ross v Cook* [2009] NSWSC 671 at [7] per Davies J; *HSD Co Pty Ltd v Masu Financial Management Pty Ltd* [2008] NSWSC 1279 at [10] per Rothman J. As Nettle JA pointed out in *St George Bank Limited v Quinters Pty Ltd* [2009] VSCA 245 at [57]:

Proportionate liability provisions of the kind prescribed by Part IVA were adopted by the Commonwealth and by each of the States and Territories as in effect a national co-operative scheme designed to overcome what were perceived to be undesirable consequences of the joint and several liability rule.

That legislative correspondence and the wide scope given to interpreting beneficial legislation would discourage a forum shopping plaintiff from seeking to take advantage of differently worded proportionate liability provisions in different jurisdictions.

(See further, ‘Contracting Out’)

Just apportionment

Under CLA s 35 (1), a court cannot give judgment against a defendant for more than the “proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant’s responsibility for the damage or loss”. Although this determination of just apportionment is clearly one of the key decisions a court needs to make when considering a proportionate liability defence, there are no guidelines in the Act for the making of that determination other than the words just quoted.

Yates v Mobile Marine Repairs Pty Ltd [2007] NSWSC 1463 was a case involving apportionment of loss suffered as a result of negligent boat repairs, and the boat repair agency to whom the boat was taken and the boat repairer's principal who assisted with the work were found to bear equal responsibility.

In *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694; (2007) 13 BPR 24,675, the proportionate liability provisions of the CLA were applied so as to apportion liability in that case (which concerned a forged mortgage) at 90% to the forger, Mr Pan, and 10% to the forger's solicitor, Mr Miller, who had unwittingly assisted the fraud after negligently accepting that Mr Pan had authority to act on behalf of the registered proprietors of the land in question. Bryson AJ made this statement at [113]:

Mr Pan acted deceitfully in pursuit of a large monetary advantage which he gained; Mr Miller was deceived and conducted an apparently small piece of professional work in a way which fell short of appropriate skill. I consider it just, having regard to the extent of his responsibility, that Mr Miller's liability be limited to 10 per cent of the plaintiffs' loss.

In the course of his judgement His Honour also cited an article by Matthew Bransgrove entitled "Mortgage Law: What can solicitors do to reduce mortgage fraud?" in the Law Society Journal, November 2004.

In *Reinhold v NSW Lotteries Corporation (No 2)* [2008] NSWSC, a person who had purchased what would otherwise have been the \$2,000,000 winning lottery ticket had that ticket accidentally cancelled by the combined negligence of the newsagent at which it was purchased and the lotteries commission (who accidentally cancelled the ticket in question instead of another, defective, ticket). In that case it was found that the Lotteries Corporation had far greater responsibility as it was very experienced in dealing with ticket cancellations and the newsagent was not, and all the newsagent did was to follow the Lotteries Corporation's instructions (although the newsagent was negligent in not volunteering additional pertinent information). The apportionment was thus 90% to the Lotteries Corporation and 10% to the newsagent.

In *Reinhold*, Barrett J held that a valid analogy could be drawn between apportionment cases and contributory negligence cases, and cited the following test established by the High Court in the contributory negligence case of *Podrebersek v Australian Iron and Steel Pty Ltd* [1985] HCA 34 at 10 for apportionment between plaintiff and defendant as also applicable in an apportionment case as between defendants under the Civil Liability Act:

The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, i.e. of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* [1956] HCA 26; (1956) 96 CLR 10, at p 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd* [1953] UKHL 4; (1953) AC 663, at p 682; *Smith v McIntyre* (1958) TasSR 36, at pp 42-49 and *Broadhurst v Millman* (1976) VR 208, at p 219 and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance.

His Honour also examined English authorities (such as *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48) relating to the *Civil Liability (Contribution) Act 1978* (UK) (which contains a similar test for apportionment), noting that the UK position included a consideration of the insolvency of the various defendants even though that had nothing to

do with responsibility. His Honour rejected that approach as being applicable in Australia, stating at [53]:

There is not in the Australian case law any indication that factors beyond the relevant person's "responsibility for the damage in question" may be taken into account in the determination of what is "just" or "just and equitable"; or that the benefit of profits or burden of losses is relevant to the question of such "responsibility". The "having regard to" specification delimits the field of inquiry.

At [57], after citing *Amaca Pty Ltd v State of New South Wales* [2003] HCA 44 and *Rexstraw v Johnson* [2003] NSWCA 287, his Honour noted:

These two cases show that the financial strength or profitability of a party is not to be taken into account in assessing contribution or apportionment. Nor is it relevant to look to the situation or status of a party (for example, that it is a polity financially dependent on the exaction of revenues from its citizens). The attitude of a wrongdoer in the terms of remorse or lack of remorse is also irrelevant. The *Dubai Aluminium* case (above) raises an issue which, it appears, has not received direct attention in Australia, that is, whether the fact that one wrongdoer has profited from the wrongdoing and retains the profit may be taken into account. I am of the opinion that, for the reasons stated at paragraph [53] of the speech of Lord Nicholls (see paragraph [48] above), that fact, if it exists, is inevitably relevant since, as his Lordship observed, it goes to the issue of responsibility with which s 35(1)(a) of the *Civil Liability Act* is expressly concerned.

In *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505, Young CJ in Eq applied the proportionate liability scheme under the CLA to the case before him, which involved the forgery of a mortgage. The mortgagee lost its money, and was found to have done so as a result of the wrongful actions of three people, being Mr Caradonna who forged the mortgage and took the money, Mr Flammia who falsely witnessed the purported signature of the mortgagor on the mortgage, and the mortgagee's solicitors, Hunt and Hunt, who had badly drafted the mortgage by choosing to use an "all monies" form of mortgage despite the much greater vulnerability of such a form of mortgage to fraud.

His Honour noted the 90%/10% liability split in *Chandra v Perpetual Trustees Victoria Ltd*, and also referred to the same apportionment of 90% responsibility to the fraudster and 10% to the solicitor in *Ginelle Finance Pty Ltd v Diakakis* [2007] NSWSC 60 (a case heard by Hoeben J and in which again the solicitor had acted negligently but without fraud). As noted previously, *Ginelle* was a contribution case rather than one decided under any proportionate liability legislation, this reference illustrates the readiness of courts in determining proportionate liability to take a similar approach as was taken in determining contribution between concurrent wrongdoers.

Young J found that in a case of forgery the persons perpetrating the forgery should bear the great majority of the responsibility for the loss, and a solicitor innocent of any intentional wrongdoing only a small share. His Honour contrasted such a case with that

of *State Bank of NSW Ltd v Yee* (1994) 33 NSWLR 618, in which a solicitor had falsely attested that a document had been signed in his presence and a finding had been made that it was the solicitor's conduct rather than a series of subsequent forgeries that were the cause of the plaintiff's loss. *Yee* is of limited assistance in the field of proportionate liability, however, as the case was not one involving any form of apportionment, either between concurrent wrongdoers or even for contributory negligence.

In *Vella*, Young CJ in Eq allocated to the solicitor a slightly larger proportion of the liability than in *Chandra* or in *Ginelle*, stating at [597-8]:

I consider that the degree of negligence of the solicitors exceeds that in the cases before Hoeben J and Bryson AJ. I consider that the fact that Hunt & Hunt were retained to protect the client from what actually happened is a significant factor...

His Honour's comments were referring to the fact that Hunt and Hunt had been engaged by the mortgagee to draft the mortgage documents to head off just the sort of problem that had occurred. His Honour then ordered that Hunt & Hunt pay 12.5% of the mortgagee's loss, with the responsibility of Mr Caradonna set at 72.5% and that of Mr Flammia at 15%. Both Mr Caradonna and Mr Flammia were bankrupts, but as noted previously, that makes no difference in a proportionate liability situation. In consequence, the claimant, Mitchell Morgan, was only able to recover one-eighth of its loss.

Contracting Out

Different pieces of proportionate liability legislation have different rules concerning contracting out, and this each must be examined individually.

Section 3A of CLA reads as follows:

- (2) This Act (except Part 2) does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract with respect to any matter to which this Act applies and does not limit or otherwise affect the operation of any such express provision.
- (3) Subsection (2) extends to any provision of this Act even if the provision applies to liability in contract.

The proportionate liability provisions of the CLA are not found in Part 2, and thus s 3A gives an express right to contract out of those proportionate liability provisions. Of course, the contract can only bind the contracting parties, thus any non-contracting defendant is free to rely on a proportionate liability defence even if another defendant may be excluded by contract from raising proportionate liability. In such a case the contracting defendant would be liable for the entirety of the loss, whilst the non-contracting defendant would be liable only for their proportional share as if there were no contract.

It is important to note that CLA s 3A(2) refers to parties “making express provision” (not implicit) in their contract. In order to exclude or modify proportionate liability, therefore, an express term needs to be included in the contract, setting out in clear words the agreed exclusion or modification.

Part IV of the CLA applies to liability arising before as well as after the commencement date: Schedule 1, Clauses 6(1), 13; see *Yates* at [89]. In light of the requirement for express words of exclusion in respect of the proportionate liability provisions, contractual indemnities given prior to commencement of the CLA are likely to be rendered ineffective where the apportionment provisions apply, although no authority has been found precisely on that point.

It should be noted that the proportionate liability legislation in Victoria, Queensland, Western Australia and the ACT prevents contracting out.

There is no equivalent to CLA s 3A in the TPA, the Corporations Act or the ASIC. None of these Acts expressly permits contracting out of the Act’s proportionate liability provisions, and thus by implication contracting out is impossible. Accordingly a Lender that has, in their retainer agreement with a valuer, contracted out of proportionate liability should bring its action in the Supreme Court and not rely upon Commonwealth statutory causes of action.

Effect of settlements

A concurrent wrongdoer who settles an apportionable claim must bear in mind that, given the abolition of actions for contribution or indemnity against other concurrent wrongdoers with a judgment against them with respect to such claims, the settling defendant cannot normally proceed to recoup part or all of its settlement payment from other concurrent wrongdoer defendants: see *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Australia Pty Ltd* [2008] VSC 90. Such a defendant should therefore be careful not to settle for an amount likely to be in excess of its proportionate share of liability.

A plaintiff who settles against one of several concurrent wrongdoers is not prejudiced by this settlement in suits against the remaining wrongdoers: see *Gunston v Lawley* [2008] VSC 97. Also, settlement is not an award of damages that needs to be taken into account under CLA s 37. In regard to settlement, a plaintiff is thus in a better position under a proportionate liability regime, as under common law solidary liability recovery in any form from one concurrent wrongdoer reduced the liability of all concurrent wrongdoers.

Subsequent Proceedings

Section 37(1) of the CLA provides that a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss is not precluded from bringing another action against any other concurrent wrongdoer for that damage or loss. However, s 37(2) precludes the plaintiff in any subsequent proceedings from recovering an amount of compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff. A key question in the second proceedings is whether the damage claimed is the “same damage” suffered by the

plaintiff in the first proceedings (see *Bracks v Smyth-Kirk* [2009] NSWCA 401). Finally, s 38(2) precludes joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

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